



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPLICATION FOR LEAVE TO APPEAL BY PVT. PARTY NO.3 OF 2023

M/s. Baheti Logistics,
A Partnership Firm,
Through its Partner
Mr. Pradeep S/o. Ghanshyamdas Baheti,
Age ; 43 years, Occu. : Business,
R/o. Plot No.8, Shilp Nagar, Station Road,
Aurangabad, Dist. Aurangabad.

... Appellant.
(Orig. Complainant)

Versus

The HMD Transport,
A limited Liability Partnership Firm,
Through its Partner,
Mr. Dhiraj S/o. Harikishan Darak,
Age : 66 years, Occu. : Business,
Office At Gut No. 55, Near MIT College,
Beed Bye pass Road, Aurangabad.

... Respondent.
(Orig. Accused)

...
Mr. J. N. Singh, Advocate for Appellant.
Mr. Chaitanya Deshpande h/f. Mr. Suyog S. Rathi, Advocate for
Respondent.
...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 06 FEBRUARY 2024

PRONOUNCED ON : 08 FEBRUARY 2024

ORDER :

1. Instant leave application is on behalf of complainant on account of order passed by learned 11th Judicial Magistrate First Class, Aurangabad, below Exh.1, dated 05.01.2022 in S.C.C. No.8985 of 2018, acquitting the accused - present respondent for

offence punishable under section 138 of Negotiable Instruments Act, 1881, by invoking section 256(2) of the Code of Criminal Procedure.

2. Learned counsel for applicant pointed out that, complainant is a firm comprising of partnership between father and son. There was financial transaction between them towards purchase of container. Initial payments were made to the tune of Rs.16,81,300/-. However, subsequently only out of 10 containers, 05 containers were financed. That, in respect of 05 containers after settlement and negotiations, amount was decided to be returned and towards it cheque was issued by accused, but on its presentation it was dishonored. Therefore, legal notice was issued and finally prosecution was launched on failure to pay the cheque amount. It is pointed out that, even process was issued against the accused. However, unfortunately one of the partner Ghanshyamdas expired during Covid pandemic. Therefore, firm was required to be reconstituted by inducting new partner i.e. daughter-in-law. It is pointed out that, learned Magistrate insisted to join legal representatives for further prosecution and finally impugned order came to be passed by invoking section 256(2) of Cr.P.C.

3. He further submitted that, provisions under section

256(2) of Cr.P.C. gets attracted only when complainant has died and legal representatives are not brought on record. He took this court through the title of complaint and submitted that, complainant being partnership firm, upon reconstitution, business has been carried out by son and daughter-in-law. He also invited attention of the court to the verification of the clause of the complaint and submits that, complaint ought not to have been dismissed under above provision.

4. Learned counsel for respondent objected to the very maintainability by submitting that, since beginning son of deceased was partner of the firm and so he ought to have continued the prosecution. Daughter-in-law, who is subsequently inducted as a partner cannot prosecute. Therefore, in view of above objection, he submits that complaint as well as leave is not maintainable and sustainable.

5. On considering the submissions advanced before this court and on going through the complaint, it is emerging that, proceedings under section 138 of N.I. Act were instituted in the name of a partnership firm. It is brought to the notice that initial partnership was between deceased Ghanshyam and his son. Original copy of deed of partnership between father and son is placed on record. Ghansham is reported to be dead during Covid

period and therefore, partnership seem to be reconstituted i.e. between son and his wife, who is admittedly daughter-in-law of deceased Ghansham. Learned trial Judge seems to have dismissed the complaint by invoking provision under section 256(2) Cr.P.C. by order dated 05.01.2022.

6. During arguments both sides have made submissions for and in against of applicability of section 256(2) of Cr.P.C. Resultantly, law point has been raised regarding maintainability of the complaint and instant proceedings is merely leave to file appeal.

7. Therefore, legal issue is required to be dealt at length and the same can be done only on full-fledged appeal. Therefore, as there is legal point to be addressed and decided, hence leave as prayed deserves to be granted. Hence, I proceed to pass following order :-

ORDER

- (i) Application stands allowed.
- (ii) Leave is granted to file Appeal.
- (iii) Registry to register the Appeal.
- (iv) Appeal stands **admitted**.
- (v) Call record and proceedings.

(ABHAY S. WAGHWASE, J.)